No. 92-1691

Supreme Court, U.S.
FILED
JUN 23 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CONSOLIDATION COAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

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QUESTION PRESENTED

Whether petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing to honor a union's request for information relevant to the performance of the union's duty to administer and monitor compliance with a collective-bargaining agreement.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-4a) is unpublished, but the judgment is noted at 986 F.2d 1408 (Table). The decision and order of the National Labor Relations Board (Pet. App. 5a-12a), including the decision and recommended order of the administrative law judge (Pet. App. 13a-52a), is reported at 307 N.L.R.B. No. 13.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1993. The petition for a writ of certiorari

was filed on April 20, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a subsidiary of DuPont Energy Co., engages in the mining and sale of coal at a number of facilities in Pennsylvania. Pet. App. 15a. Petitioner is a signatory to the 1988 National Bituminous Coal Workers Agreement with the International Union of the United Mine Workers of America (Union). *Id.* at 16a. That Agreement provides, *inter alia*, that "the first three out of every five new job openings for work . . . at any existing, new, or newly acquired non-signatory bituminous coal operation of the [e]mployer shall be filled by classified laid off employees." *Id.* at 17a-18a n.2. The Agreement applies to all coal lands and coal preparation facilities held by petitioner and its affiliates, whether in operation at the time of the execution of the Agreement or at any time thereafter. *Id.* at 18a.[1]

In 1984, petitioner built a mine known as Bailey No. 1 in Greene County, Pennsylvania. Petitioner created a wholly owned subsidiary, Consol Pennsylvania Coal Company (CPCC), to operate the mine. Thereafter, petitioner began work on a "companion mine" to Bailey No. 1, originally known as Bailey No. 2. In March 1990, the mining permit applicable to Bailey No. 2 was transferred from CPCC to Enlow Fork Mining Company, a newly created wholly owned subsidiary of DuPont Energy Co. Pet. App. 20a-22a. After a newspaper report disclosed that Bailey No. 2 (now renamed the Enlow Fork Mine) would be operated by Enlow Fork and not by

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[1] The Agreement authorizes employees who are laid off from a signatory employer's operations to complete "panel" forms requesting reemployment at other mines operated by the signatory. The forms are then retained by the signatory employer and the Union. Pet. App. 17a-18a.

petitioner, the Union decided to investigate whether hiring at the Bailey and Enlow Fork mines was being conducted in accordance with the Agreement. *Id.* at 22a-23a.

Accordingly, on April 18, 1990, the Union sent petitioner a letter requesting information respecting each company in which petitioner "plays a role or has an interest," including CPCC, Enlow Fork, and DuPont Energy Co. Pet. App. 24a.[2] Thereafter, two Union locals filed grievances against petitioner, alleging that petitioner, by and through CPCC, Enlow Fork, DuPont Energy Co., and its other subsidiaries and affiliates, was violating the Agreement by refusing to recognize laid-off employees' contractual reemployment rights. *Id.* at 25a. Petitioner denied the grievances. *Id.* at 23a-24a, 25a-26a.

The Union then pressed its grievances through the next stage of the contractual grievance procedure, and informed petitioner that the information requested on April 18 was necessary to determine whether petitioner was violating the Agreement as alleged in the grievances. Petitioner refused to comply with the Union's information request, however, and insisted that the Union either drop the grievances or present them to the arbitrator without benefit of the requested information. Pet. App. 26a-27a.

On June 8, 1990, the Union's first grievance was presented to an arbitrator. The arbitrator did not reach the merits of that grievance, however, finding instead that petitioner was required to furnish the Union with

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[2] The information which the Union sought from petitioner included: documents respecting leases, subleases, mining permits, and annual returns for employee benefit plans; the identity of officers, directors, management representatives, customers, and insurers of petitioner and its subsidiaries and affiliates; and information respecting hiring procedures and the transfer of personnel between petitioner and its affiliates. Pet. App. 24a-25a.

the requested information. Pet. App. 27a.[3] Rather than comply with the arbitrator's decision, petitioner filed a lawsuit in the United States District Court for the Western District of Pennsylvania seeking to have that decision set aside. The Union counterclaimed for enforcement of the arbitral award, and filed a separate action in federal court to compel the joint participation of petitioner, CPCC, and Enlow Fork in processing the Union's grievances. *Id.* at 27a-28a.

On March 2, 1993, the district court in the action brought by petitioner to challenge the arbitrator's award entered an order upholding the award in part and vacating it in part. *Consolidation Coal Co.* v. *United Mine Workers of America*, No. 90-1443 (W.D. Pa. Mar. 2, 1993), appeal pending, No. 93-3145 (3d Cir. filed Mar. 29, 1993). The court held that petitioner is obligated to provide all requested information concerning its own operations, including contracts, leases, and other documents to which petitioner is a party, but is not obligated to produce documents pertaining solely to petitioner's affiliated entities. Slip op. 6-8. The court noted, however, that "those documents may be obtainable pursuant to the broader powers of the NLRB." *Id.* at 7.

2. a. Meanwhile, on May 21, 1990, the Union filed an unfair labor practice charge with the National Labor Relations Board (Board) challenging petitioner's refusal to honor the Union's information request. The Board's Regional Director then issued a complaint against petitioner based on that charge. The complaint alleged that petitioner had committed an unfair labor practice in violation of Section 8(a)(1) and (5) of the National Labor

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[3] The arbitrator specifically noted that the question whether petitioner committed an unfair labor practice by refusing to honor the Union's information request was not before him. Pet. App. 27a.

Relations Act (Act)[4] by failing to furnish the Union with information necessary to the enforcement of the Agreement. Pet. App. 14a-15a.

The administrative law judge (ALJ) found that petitioner had violated Section 8(a)(1) and (5) as alleged. Pet. App. 13a-52a. The ALJ stated that "it is well established that * * * an employer must comply with a union's request for information that will assist the union in fulfilling its responsibilities as the employee's statutory representative * * * including information relevant to both contract administration and contract negotiation." Pet. App. 34a (citing *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979); *Leland Stanford Jr. University*, 262 N.L.R.B. 136 (1982), enforced, 715 F.2d 473 (9th Cir. 1983)). The ALJ further noted that "[t]he standard applied in determining relevancy in these circumstances requires that the information have some bearing on the issue for which the information is requested and be of probable or potential relevance to the Union's duties." Pet. App. 35a.

Applying that standard to the facts of this proceeding, the ALJ found that the Union had requested the information from petitioner "in order to pursue its grievances filed under [the Agreement]" by seeking "to establish that [petitioner], CPCC, Enlow Fork and any other subsidiary or affiliate operate as a joint or single employer with [petitioner]." Pet. App. 39a. The ALJ also indicated that the information had been requested in

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[4] Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of rights guaranteed by Section 7 of the Act, 29 U.S.C. 157. Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

order " 'to effectively administer and monitor important contractual rights and obligations' " and " 'to determine the extent if any of the interrelationship between signatory companies and nonsignatory companies for the purposes of contract administration and bargaining.' " *Id.* at 38a-39a.

The ALJ further found that the Union had an objective basis for believing that petitioner, by and through its affiliated entities, was seeking to avoid its obligation to hire laid off employees as specified by the Agreement. The ALJ pointed out that petitioner had previously recognized that the Agreement was applicable to the Bailey Mine. Moreover, various corporate publications of petitioner treated the Bailey Mine as part of petitioner's operations, despite petitioner's contention that the Mine was solely an operation of CPCC. The Union was also aware of several instances in which supervisory personel were transferred between the Bailey Mine and one of petitioner's mines. Pet. App. 39a-42a. Moreover, the ALJ noted that (1) both the Bailey Mine and the Enlow Fork Mine "are entered via a common entrance"; (2) coal is removed from each mine "via the same slope and is dumped on a common belt"; and (3) the coal produced by both mines is sold jointly by petitioner and CPCC. *Id.* at 42a-43a. Accordingly, the ALJ recommended that the Board order petitioner to turn over to the Union all of the requested information. *Id.* at 48a.

b. The Board, with certain modifications not relevant here, affirmed the ALJ's decision and adopted his recommended order. Pet. App. 5a-9a.

3. The court of appeals enforced the Board's order in an unpublished judgment order. Pet. App. 1a-4a.

ARGUMENT

1. It is settled law that "[t]he duty to bargain collectively, imposed upon an employer by [Section] 8(a)(5) of the [Act], includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 303 (1979) (footnote omitted). Because collective bargaining is a continuing process, an employer is obligated by the Act to furnish the union relevant information, not only in connection with negotiating a contract, but also for the purpose of administering it. *Curtiss-Wright Corp.* v. *NLRB*, 347 F.2d 61, 68 (3d Cir. 1965); *J.I. Case Co.* v. *NLRB*, 253 F.2d 149, 153 (7th Cir. 1958). Although contract administration may involve filing grievances, and an employer must provide the union with information relevant to evaluating the merits of such claims, *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 437-438 (1967), a union is also entitled to receive information in order to verify employer compliance with contractual obligations regardless of whether the issue is the subject of a pending grievance. *Michigan Drywall Corp.*, 232 N.L.R.B. 120, 122-123 (1977); *Weber Veneer & Plywood Co.*, 161 N.L.R.B. 1054, 1055-1056 (1966); *General Controls Co.*, 88 N.L.R.B. 1341, 1343, 1354-1355 (1950).

Petitioner appears to concede (Pet. 12-13) the validity of the legal principles set forth above. Petitioner contends (Pet. 16-19, 24-25, 27), however, that the Board erred in concluding that the information sought by the Union is relevant to the Union's statutory duties. According to petitioner, that information is relevant only to the Union's pending action in federal district court seeking to require petitioner's affiliates to participate in the resolution of the pending grievances. Pet. 17, 25-26.

The Board found that the information sought by the Union is relevant to the performance of the Union's duty "to effectively administer and monitor important contractual rights and obligations" such as seniority, recall and bidding rights. Pet. App. 38a-39a. It is self-evident that documents describing the corporate relationships between petitioner and its affiliates are relevant to the question whether petitioner is using its affiliates to evade its reemployment responsibilities under the Agreement; and it is equally self-evident that the Union has a legitimate interest in discovering the answer to that question, which directly implicates the reemployment rights of the Union's members. Thus, the Board properly found that, wholly apart from the pendency of the lawsuit in federal district court, the information sought by the Union is relevant to the performance of the Union's duties as representative of employees covered by the Agreement. That fact-bound determination does not warrant further review.[5]

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[5] Petitioner also argues (Pet. 17-18, 20) that the Board's order was not in aid of the arbitral process because the arbitrator lacks authority to decide whether petitioner's affiliates are obligated to submit to arbitration under the Agreement on the ground that they are alter egos of petitioner. It is settled law, however, that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator," who "may of course look for guidance from many sources" "for help in determining the sense of the agreement." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-598, 599 (1960). If in fact petitioner's affiliates are alter egos of petitioner, those enterprises are bound by petitioner's legal and contractual obligations, including the duty to arbitrate grievances under petitioner's collective-bargaining agreement. *Howard Johnson Co.* v. *Detroit Local Joint Executive Board*, 417 U.S. 249, 259 n.5 (1974). In light of that principle, an arbitrator might well interpret the Agreement, including its grievance provisions, to apply to any employer that is an alter ego of petitioner. Accordingly, the Board's order was in aid of the arbitral process because

2. Petitioner contends (Pet. 18-26), however, that the Board should have abstained or been precluded from directing petitioner to produce the requested information because the Board's order improperly intrudes on the jurisdiction of the court before which is pending the Union's lawsuit seeking to compel petitioner's affiliates to participate in resolution of grievances under the Agreement. According to petitioner, the federal courts have exclusive authority to decide whether petitioner's affiliates can be compelled to participate in grievance proceedings on the ground that they are alter egos of petitioner, and thus the Board's order requiring petitioner to produce information relevant to that issue improperly intrudes upon the courts' jurisdiction over discovery matters relating to the pending lawsuit.

Petitioner's contention is without merit. As the Board found, petitioner committed an unfair labor practice by refusing to provide the Union with information relevant to the performance of the Union's duties. That unfair labor practice is separate and distinct from the question whether petitioner's affiliates are in fact alter egos such that the Agreement is applicable to them as well, and it is only the latter question that is pending before the federal courts in the Union's lawsuit. The Board's authority to remedy petitioner's unfair labor practice is wholly independent of, and unaffected by, the pending lawsuit.

Section 10(a) of the Act, 29 U.S.C. 160(a), provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of * * * prevention * * * established by * * * law." As this Court has observed, "the Board may proscribe conduct

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the information requested by the Union was relevant to establishing which (if any) non-signatory entities are alter egos of petitioner. Pet. App. 43a.

which is an unfair labor practice even though it is also a breach of contract remediable as such * * * in the courts." *NLRB* v. *Strong*, 393 U.S. 357, 361 (1969). Thus, the pendency of the Union's lawsuit to enforce the Agreement did not deprive the Board of authority to remedy petitioner's unfair labor practice; "in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither preempting the other." *Id.* at 360.

Petitioner also errs in contending (Pet. 21) that the Board's order creates an unacceptable risk of conflict between the Board and the "decisions of the District Court regarding discovery disputes posed in the Federal Court action." The obligation of employers to provide relevant information to unions under Section 8(a)(5) of the Act is entirely distinct from, and independent of, the obligation to provide discovery in pending civil actions pursuant to the Federal Rules of Civil Procedure. See *International Union of Electrical Workers* v. *NLRB*, 648 F.2d 18, 25-26 (D.C. Cir. 1980). There is little potential for conflict between the Board and the district court in this area, because the sources of law and governing legal standards in each proceeding are different.[6] Accordingly, petitioner's claims are without merit, and do not warrant further review.

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[6] Similarly, while the district court in *Consolidation Coal Co.* v. *United Mine Workers of America*, No. 90-1443 (W.D. Pa. Mar. 2, 1993), appeal pending, No. 93-3145 (3d Cir. filed Mar. 29, 1993), declined to order petitioner to produce all of the documents sought by the Union in the arbitration proceeding, the court acknowledged that "those documents may be obtainable pursuant to the broader powers of the [Board]." Slip op. 7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JERRY M. HUNTER
General Counsel

YVONNE T. DIXON
Acting Deputy General Counsel

NICHOLAS E. KARATINOS
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

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